development without discriminating against the products of, or business operations conducted in, other States.

The court of appeals misapplied the relevant precedents of this Court. The decisions of this Court on which the court below sought to rely each concern "location incentives" under which the challenged state tax scheme attempted to benefit particular local business activity by imposing additional tax burdens if the activity was conducted out-of-state. By contrast, under the Ohio investment tax credit provision, while local activity is benefited, no additional tax burden is imposed if the targeted activity is undertaken elsewhere. There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce, and the state tax provision therefore does not violate the dormant Commerce Clause.

ARGUMENT

I. RESPONDENTS LACK STANDING.

1. *Background of the Standing Issue.*

Article III of the Constitution limits the judicial power to the resolution of "cases" and "controversies." "The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' * * * and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' * * * ." *Id.* at 472

(citations omitted). The constitutional content of the "standing" doctrine limits the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Vigilant enforcement of the standing requirement "forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge*, 454 U.S. at 473.

The Court has summarized the three constitutional elements of the standing requirement as follows. The plaintiff must show that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-181 (2000). See also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Court has had several occasions to apply these standing requirements to actions brought by taxpayers to challenge the constitutionality of state and federal tax legislation. In the early case of *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court held that "a taxpayer of the United States" lacks standing to challenge the constitutionality of a federal appropriation because his interest as a taxpayer "in the moneys of the treasury" was "shared with millions of others," was "comparatively minute and indeterminable," and the

effect of the requested injunction "upon future taxation [would be] remote fluctuating and uncertain." *Id.* at 487. The Court concluded in *Frothingham* that a federal taxpayer lacks standing to bring a challenge to a federal revenue provision when his allegation of injury is "merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.[3]

That same standing rule was held to apply to suits brought by state taxpayers who challenge the constitutionality of state tax and spending provisions in *Doremus v. Board of Education*, 342 U.S. 429 (1952). The Court held that state taxpayers, like federal taxpayers, have an interest that is "too indeterminable, remote, uncertain and indirect" to provide standing to challenge the constitutionality of state revenue measures. *Id.* at 433-434. To bring such a case, the plaintiff must show that he has suffered a "direct dollars-and-cents injury" in "a good-faith pocketbook action." *Id.* at 434. There must be a "special injury" apart from the general allegation that the plaintiff is a "taxpayer" to satisfy that standard. *Ibid.*

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[3] In reaching the conclusion that the interest of federal taxpayers in the federal fisc is insufficient to establish standing to challenge federal revenue measures, the Court pointed out that a different rule had been applied for "resident taxpayers" who brought an action against a "municipal corporation," on the theory that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Frothingham v. Mellon*, 262 U.S. at 486. The Court explained that the different rule for municipal taxpayers was "based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Id.* at 487. See also *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

The decisions rejecting "taxpayer standing" were revisited by the Court in *Flast v. Cohen*, 392 U.S. at 91-94, and in the *Valley Forge* case, 454 U.S. at 477-478. In *Flast*, the Court concluded that a taxpayer, acting *as* a taxpayer and not claiming any direct injury to any other interest, would "be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution" and, in doing so, must claim that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." 392 U.S. at 102-103.

The *Flast* test was criticized by commentators and has been "sharply limited" by subsequent decisions of the Court. Fallon, Meltzer, Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 128-129, 161 (5th ed. 2003). In particular, in the *Valley Forge* case, the Court endorsed the validity of the general rule that denies standing for federal and state taxpayers, acting *as* taxpayers, in challenging federal and state revenue measures. 454 U.S. at 477-478. The Court stated that the "*Flast* exception to the *Frothingham* principle" was to be applied narrowly and with "rigor." *Id.* at 481 (citing *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)).

Under *Valley Forge*, an allegation of taxpayer injury that is not based on a specific constitutional limitation on the taxing power and that is instead predicated on the desire, "possessed by every citizen, to require that the Government be administered according to law," is not sufficient to establish standing. 454 U.S. at 482-483. The Court emphasized that general allegations of "taxpayer standing" are insufficient, for "[s]uch claims amount to little more than attempts 'to employ

a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Id.* at 483 (quoting *Flast v. Cohen*, 392 U.S. at 106).

1. *The Nature of Respondents' Claims of Standing.*

In an effort to establish their standing to challenge the Ohio investment tax credit in this case, respondents have segregated themselves into three separate categories:

> (i) the "Ohio Plaintiffs" who base their standing on the claim that they are residents and taxpayers in Ohio who "are injured by this [state tax credit] scheme in that the subsidy depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments" (Complaint ¶ 40);
>
> (ii) the "Michigan Plaintiffs" who base their standing on the claim that they are residents of Michigan who could have benefited from the "economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited," if "the facilities had instead been located in Michigan" (Complaint ¶ 24); and
>
> (iii) a single plaintiff named "Kim's Auto and Truck Service, Inc.," which alleged that its business location was being condemned by the city of Toledo because it was within the area being redeveloped by DaimlerChrysler and that "[w]ithout the aforesaid tax exemption, the [DaimlerChrysler] plant would not have been expanded" (Complaint ¶ 23).

For the reasons that follow, none of these parties satisfies the constitutional requirement for standing to challenge the state

investment tax credit in this case. The courts below therefore lacked jurisdiction over that issue in this case.[4]

3. *The Constitutional Requirements For Standing Are Not Met In This Case.*

a. *The "Ohio Plaintiffs" Lack Standing.* The first group of respondents base their individual claims of standing solely on their status as residents and taxpayers in Ohio. That claim of standing is barred by *Doremus*, in which this Court held that the limitations on federal taxpayer standing established in the *Frothingham* case apply "equally * * * when a state Act is assailed." 342 U.S. at 433-434. *Accord*, *Valley Forge*, 454 U.S. at 478. Unless the taxpayer has himself paid the tax and is bringing an action for a refund, or unless some independent injury has been caused by the statute that makes the plaintiff's action a "good-faith pocket book action," there is no standing for a taxpayer, acting solely in his capacity *as* a taxpayer, to challenge the constitutionality of the state tax. *Doremus v. Board of Education*, 342 U.S. at 431, 434-435 (no standing when the plaintiff premises his claim of standing on the fact he "is 'a citizen and taxpayer' [and] the only interest he asserts is just that").

In the present case, the only injury claimed by the Ohio Plaintiffs is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. That claimed injury plainly does not suffice. Addressing that exact claim in

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[4] These petitions do not present the question whether any of the respondents has standing to challenge the municipal property tax exemption, which is the subject of respondents' pending petition for a writ of certiorari in *Cuno v. DaimlerChrysler Corp.*, No. 04-1407. See note 3, *supra*.

Doremus, the Court stated that it is "too indeterminable, remote, uncertain and indirect" to suffice for standing. 342 U.S. at 433-434. That generalized grievance is not a "special injury" to a "direct and particular financial interest" of the plaintiffs. *Id.* at 434-435. Instead, it is merely an allegation of a remote and unspecific harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. at 488. See *Doremus v. Board of Education*, 342 U.S. at 434. It therefore does not suffice to establish standing in this case. *Ibid. Accord, Coyne v. The American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (a claim of "taxpayer" standing does not allege "an injury that is distinct from the injury shared by all Ohio taxpayers" and is "therefore insufficient to establish an injury in fact")); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3531.10, at 656-657 (2d ed. 1984) (("[a]ny general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail").

The opinion of Justice Kennedy in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), summarizes these established principles and notes that "[t]he question whether taxpayers or citizens have a sufficient personal stake to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens covers old and familiar ground." *Id.* at 613.[5] The general

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[5] While the brief concurring opinion of Justice Brennan in *ASARCO*, 490 U.S. at 633, expressed direct disagreement with the conclusion that a teachers' association lacked standing in that case, it did not state specific disagreement with the separate conclusion that the state taxpayers lacked standing. The concurring opinion stated that it was unnecessary to reach the standing issue in *ASARCO* in any event because federal standing principles did not govern the underlying state court action in that case. See *ibid.*

rule for federal taxpayers is that such suits are not cognizable "because a taxpayer's 'interest in the moneys of the Treasury * * * is shared with millions of others, is comparatively minute and indeterminable.'" *Ibid.* (quoting *Frothingham v. Mellon*, 262 U.S. at 487). And, the Court has "likened state taxpayers to federal taxpayers, and thus [has] refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." 490 U.S. at 613-614 (quoting *Doremus v. Board of Education*, 342 U.S. at 434).[6] Under these established principles, state taxpayers cannot rely on their status as taxpayers alone but must allege "special circumstances or exceptions that would confer standing upon them." 490 U.S. at 614. State taxpayers lack standing, when, as here, they merely allege that the state law they oppose could result "in unnecessarily higher taxes" for them and do not advance any claim upon which they could recover "any direct pecuniary relief from the lawsuit." *Ibid.*

b. *The "Michigan Plaintiffs" Lack Standing.* The "Michigan Plaintiffs" are residents and taxpayers of Michigan who claim that they are injured by the Ohio investment tax credit on the theory that DaimlerChrysler was induced by the credit "to continue to operate its plants in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan." Complaint ¶¶ 3, 42. They broadly assert that, if the plant had been located in Michigan instead of expanded in Ohio, there would have been

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[6] In pointing out that the same standing rule applies to federal and state taxpayers, Justice Kennedy noted in *ASARCO* that "[w]e have indicated that the same conclusion may not hold for municipal taxpayers, if it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" 490 U.S. at 613 (quoting *Frothingham v. Mellon*, 262 U.S. at 486-487). See notes 3 & 4, *supra*.

"economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." *Id.* ¶ 42.

To the extent that the Michigan Plaintiffs assert standing based on the alleged indirect consequences of the Ohio tax credit on their Michigan tax burden, their allegations are obviously even more attenuated than those of the Ohio Plaintiffs and fail to satisfy the constitutional prerequisites for standing. It is well established that such generalized "taxpayer" allegations are insufficient to establish standing, for there is no "special circumstance" that would create anything other than a "fluctuating and uncertain" possibility that taxpayers will receive any direct pecuniary relief from the lawsuit. *Frothingham v. Mellon*, 262 U.S. at 487; *ASARCO Inc. v. Kadish*, 490 U.S. at 615. The alleged injury is too "remote" and "speculative" to establish standing. It is a prototypical "generalized grievance," which is shared by all citizens alike, and which this Court has "consistently held [is] not cognizable in the federal courts." *Ibid.* (citing, *e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983); *Valley Forge*, 454 U.S. at 482-487).

The broad allegation of the Michigan Plaintiffs that, if the credits had not been allowed by Ohio, the plant might have instead been relocated to Michigan, is also insufficient to establish the "direct and personal" injury that is required to support standing. The broad suggestion that additional jobs might be created in Michigan if the DaimlerChrysler plant were relocated there is a generalized, rather than a personal, claim and is too "remote or speculative" to establish standing in this case. In particular, there is no allegation that any of the Michigan Plaintiffs "personally has suffered some actual or threatened injury" from the renovation of the Jeep plant in Toledo or from any feature of the challenged Ohio tax credit

provision. *Coyne v. The American Tobacco Co.*, 183 F.3d at 494 (quoting *Valley Forge*, 454 U.S. at 472). The desire of the Michigan Plaintiffs for job growth in the local economy is simply one of "the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. at 616 (citing, *e.g.*, *Valley Forge*, 454 U.S. at 482-487).

Moreover, even if such generalized allegations were otherwise sufficient, they would fail under a wholly separate and different branch of the standing doctrine. This Court's cases have made clear that a plaintiff's injury must not only (i) be direct and (ii) be caused by the challenged state statute, but (iii) the plaintiff must also show that a favorable court decision would "redress" the claimed injury. *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). As this Court summarized this rule in the *Valley Forge* case, for standing to exist, the "distinct and palpable injury" claimed by the defendant must be "likely to be redressed if the requested relief is granted." 454 U.S. at 475 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). See *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Unless it is "likely, as opposed to merely speculative, that the injury [asserted by the plaintiff] will be redressed by a favorable decision," there is no standing to adjudicate the plaintiff's claims. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. at 181.

The injury alleged by the Michigan Plaintiffs would be "redressed" only by an order that caused relocation of the DaimlerChrysler plant in Toledo to Michigan. Nothing in the Complaint, however, seeks or could possibly result in that relief. In particular, there is no allegation in the Complaint that an injunction entered against the Ohio tax credit

provisions would stop or reverse the improvements at the Jeep plant in Toledo and cause the relocation of the plant to Michigan. Nor could such an allegation have been made in good faith. The improvements at the Toledo facility had long been in progress and, even on the date of the filing of the Complaint, were substantially implemented. By the time that the Complaint was filed (March 29, 2000), the Jeep plant expansion Development Agreement had been in place for almost a year and a half. Complaint ¶ 18. See also page 18, *infra*. In view of the substantial progress of the Jeep expansion project, it was not possible for plaintiffs to contend, in good faith, that an injunction entered against the tax credits would cause the removal of that facility from Toledo. Presumably for this very reason, the Complaint contains no such allegation.

Instead, the Complaint alleges only in the past tense that, in the absence of the challenged Ohio tax benefits, "the Stickney Avenue Jeep plant *would not have been expanded*." Complaint ¶ 23 (emphasis added). Because the complaint acknowledges that the plant already had "been expanded," it is evident that the injury claimed by the "Michigan Plaintiffs" is not "likely to be redressed if the requested relief is granted." *Valley Forge*, 454 U.S. at 475. The disallowance of the agreed-upon tax benefits plainly would not result in the demolition of the improvements at the Jeep plant and in its relocation to Michigan.

It is a settled rule that a plaintiff lacks standing – and the court therefore lacks jurisdiction – when, as here, the "complaint suggests no likelihood that victory in this suit would result" in redress of the asserted injury. *Coyne v. The American Tobacco Co.*, 183 F.3d at 496. Accord, *Valley Forge*, 454 U.S. at 472. Because there is no "substantial likelihood" that the relief requested by the Michigan Plaintiffs will redress the injury they claim (*Duke Power Co. v.*

Carolina Environmental Study Group, 438 U.S. 59, 75 n.20 (1978)), they lack standing to challenge the Ohio tax in this case.

c. *No Other Plaintiff Has Standing.* The only other plaintiff that claims to possess standing to challenge the Ohio tax credit provision is "Kim's Auto and Truck Service, Inc.," whose property in Toledo was "slated to be condemned" as part of the Jeep plant project. Complaint ¶ 23. The Complaint asserts, again in the past tense, that, "[w]ithout the aforesaid tax exemption, the Stickney Avenue Jeep plant *would not have been expanded*, causing Kim's Auto to be slated for displacement." *Ibid.* (emphasis added). The remedy sought in the complaint is not an injunction against the completion of the Jeep plant, and no basis for any such injunction is offered. Instead, the complaint seeks only to enjoin Ohio from providing, and DaimlerChrysler from receiving, the Ohio tax credit for the improvements made to that plant.

These allegations are insufficient to support standing. The Complaint lacks any allegation that could support a conclusion that an injunction entered against operation of the Ohio tax credit provision would cause the ongoing improvements at the Toledo Jeep facility to cease or be reversed. And, for the reasons we have just described, no such allegation could have been made in good faith either at the time the Complaint was filed or currently. Indeed, in related pleadings filed in this Court, Kim's Auto has now expressly admitted that "the new Jeep factory [in Toledo] was built and opened in 2001" and has been producing vehicles at that location since that time. *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629 at 4, cert. denied, 125 S.Ct. 2988 (2005); see also *id.* at 5 ("[t]he new Jeep plant

opened in 2000").[7] There is thus no plausible basis for any contention that an injunction against the Ohio tax credit would remedy the claimed injury of either the Michigan Plaintiffs or of Kim's Auto by causing the relocation of a facility that was evidently completed even before the complaint in this case was filed.

Respondents thus plainly fail to allege an injury that would be redressed by the relief sought. Because there is no "substantial likelihood" that the relief requested by Kim's Auto would redress the injury they claim (*Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 75 n.20)), respondents lack standing to challenge the Ohio investment tax credit.[8]

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[7] A decree of condemnation of the Kim's Auto property was entered by the state court in May 2002. The award of compensation for that condemnation became final when the petition for a writ of certiorari from the compensation award was denied by this Court in June 2005. Pet. 03-1629 at 3.

[8] In district court, respondents claimed that they have standing to proceed with their claims in state court, and they requested a remand for that purpose. There is good reason to question whether Ohio decisions would provide a basis for "taxpayer standing" in the context of this case. See *In ex rel Snyder v. State Controlling Board*, 11 Ohio App. 3d 270, 273, 464 N.E. 2d 617, 621 (1983) ("the plaintiff, as a general taxpayer, must show the action complained of has affected the plaintiff's pecuniary interests differently than the interests of the general taxpaying public"). If, however, the case were to proceed on remand in the Ohio courts, and if a final decision adverse to DaimlerChrysler were issued in those courts on the merits, that decision would then be reviewable in this Court on a petition for a writ of certiorari. See *ASARCO Inc. v. Kadish*, 490 U.S. at 619.

II. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

1. *Introduction.*

If the Court reaches the merits of this case, it will be considering the constitutionality of a classic State business tax incentive – a pure dollar-for-dollar reduction in tax liability for qualified new investment. The Ohio investment tax credit was offered to any entity choosing to increase its investment in machinery and equipment within the State. The tax credit was available not only to Ohio taxpayers such as petitioner, but also to any out-of-state taxpayer wishing to make a new investment in Ohio. In petitioner's case, the new investment was made through an expansion of its existing Jeep facility in Toledo.

The question here presented is whether it is constitutionally permissible for a State to compete for business by offering a straight-forward reduction in tax liability to any taxpayer making the requisite new investment. *Amici* believe the answer is clearly yes, because such an incentive does not discriminate against interstate commerce and does not suffer any other possible constitutional flaws.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court set forth certain fundamental principles that establish the framework within which a State may shape its policy toward business taxation.

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such

> competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-337. In other words, a State is free to use its tax system not only to encourage the growth of local business, but also to compete for its share of interstate business. The only relevant limitation is that, in so competing, the State may not structure its tax system in a way that imposes a discriminatory tax burden on out-of-state business activity.

Consistent with the foregoing ground rules, a State is clearly free to adopt a low-tax regime as a means of attracting new business. This Court so stated in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994): "In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."

1. *The Ohio Investment Tax Credit Satisfies This Court's Requirements for Constitutionality.*

The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio. It is effectively a subset of a general low-tax regime because it reduces the amount of franchise tax to be paid by any taxpayer that makes a qualified new investment in the State.

In *amici's* view, the Ohio tax credit is designed in the precise manner contemplated by this Court. It offers a reduction in the State franchise tax without imposing any additional tax burden on those taxpayers that choose to make their new investment elsewhere. The Ohio scheme is

constitutionally permissible because, in the words of this Court, it imposes no tax on "the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 337.

In analyzing the validity of the Ohio tax credit, the court of appeals below acknowledged the fundamental principles established in *Boston Stock Exchange* regarding a State's ability to compete for interstate business. Pet. App. 4a-5a. It also acknowledged that the Ohio investment tax credit was equally available to in-state and out-of-state businesses. Pet. App. 6a. Nevertheless, it concluded that the tax credit was unconstitutional.

The court of appeals reached its conclusion by fully embracing respondents' argument that the Ohio tax credit had the effect of "coercing" in-state taxpayers to make their new investments in Ohio at the expense of development in other States. Pet. App. 6a. Under the argument espoused by respondents, the decision of an Ohio taxpayer to make a new investment elsewhere would increase the taxpayer's overall tax cost in Ohio. This economic pressure, the argument runs, would influence the taxpayer to invest in Ohio, thereby "hinder[ing] free trade among the states." Pet. App. 9a.[9] In adopting respondents' argument, the court of appeals basically accepted the notion that, by providing a tax benefit to those who made new in-state investments, the Ohio taxing scheme inevitably imposed an impermissible burden on those making out-of-state investments. Pet. App. 9a-10a.

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[9] Respondents do not assert, nor could they, that the Ohio taxing scheme somehow "coerces" *out-of-state* taxpayers to invest in Ohio rather than elsewhere. Ohio's scheme does not have cognizable impact on an out-of-state taxpayer until it chooses to enter the State.

The court's benefit-burden dichotomy reflects a misreading of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* was a case involving pure "economic protectionism." The State of Hawaii had argued that an exemption accorded certain locally produced beverages from its excise tax on liquor sold at wholesale was permissible because it was intended to benefit a fledging industry and not to discriminate against out-of-state producers. This Court rejected the argument, stating (*id.* at 273):

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Contrary to the notion advanced by the court of appeals in the instant case, however, this Court did not say in *Bacchus* that *every* taxing scheme benefiting in-state business activity inevitably imposes an impermissible tax burden on out-of-state activity. Only a "discriminatory statute" produces that result. The reference of the court below to the *Bacchus* discussion of benefits and burdens merely begs the question here presented, which is whether the Ohio tax credit provision *is* a "discriminatory statute" in the first instance.

As noted, what the court below considered to be the discriminatory burden imposed by Ohio was the "coercion" of in-state taxpayers to make their new investments within the State in order not to lose the benefit of the Ohio tax credit. In other words, the availability of the credit effectively pressured in-state taxpayers to invest their next dollars in Ohio because, in an economic sense, they could not afford *not* to take advantage of the tax benefit provided.

This reasoning finds no support in the case law and is completely misguided. The only direct consequence of an Ohio taxpayer choosing to invest out-of-state is simply that it would forego the Ohio credit. There would be no additional tax burden or tax cost imposed by the taxing State, which (as we discuss further below) is the touchstone for determining unconstitutionality in a case such as this. Moreover, if the taxpayer elects to invest in another State, it would then be able to benefit from any investment tax credit or other tax benefit available in that other jurisdiction. There is plainly no economic "coercion" in such an arrangement. No case decided by this Court has ever suggested that a tax incentive of the type offered by Ohio is discriminatory merely because those taxpayers who choose to invest elsewhere must necessarily forego its benefit.

2. *The Court of Appeals Misapplied the Relevant Precedents of This Court.*

The court of appeals relied primarily on three decisions of this Court to support its conclusion that the Ohio investment tax credit was unconstitutional. All three cases involved situations where a taxpayer had the choice between carrying on certain targeted activity entirely within the taxing State, or partly within and partly without the taxing State. In each case, some form of tax incentive was offered to encourage the taxpayer to act entirely within the State. In each case, this Court struck down the taxing scheme because the State had impermissibly discriminated against interstate commerce by imposing a higher tax on the taxpayer's activity conducted in-state if it chose to conduct a portion of the targeted activity out-of-state.

Thus, in *Boston Stock Exchange*, *supra*, persons selling stock that would be transferred through a New York transfer agent paid a higher New York transfer tax if they sold their

shares on an out-of-state exchange than if the sale took place on a New York-based exchange. The higher tax imposed by New York when such sales were made out-of-state constituted "both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S. at 331.

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a subsidiary of Westinghouse that was engaged in the export business shipped its products from New York and elsewhere. Its income was consolidated with that of its parent, apportioned to the State, and subjected to the State's franchise tax.[10] A tax credit was allowed for exports attributable to New York. Calculation of the credit was based in part on the ratio of the subsidiary's New York exports to its total exports. If the subsidiary increased its out-of-state exports relative to its New York exports, its credit would be proportionately reduced and its New York franchise tax would be correspondingly increased, even though its export income subject to tax in New York remained the same. This Court concluded that the New York credit impermissibly discriminated against interstate commerce by penalizing the taxpayer for export activity outside the State.

The final case relied on below was *Maryland v. Louisiana*, 451 U.S. 725 (1981). That case involved Louisiana's imposition of a "first use" tax on natural gas that had not been subjected to tax by another jurisdiction. The tax was aimed primarily at gas that was brought onshore from the Outer

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[10] New York utilized the standard three-factor State apportionment formula, under which the ratio of a taxpayer's property, payroll and sales within the State to its total property, payroll and sales determined the percentage of its taxable income properly apportionable to, and taxable by, New York. N.Y. Tax Law 210.3 (McKinney Supp. 1983-1984).

Continental Shelf (OCS) and piped to processing plants in Louisiana. Although the tax was imposed on the owner of the gas, it was required to be passed on to the ultimate consumer. Because of numerous exemptions and credits allowed for local use and consumption, the tax was actually borne only by out-of-state consumers who purchased gas from within the State. The Louisiana scheme was struck down because it favored local consumption and discriminated against interstate commerce.

As noted, all three of the foregoing cases involved situations where the taxing State overreached by increasing the tax on in-state activity if the taxpayer undertook to conduct some portion of its activity out-of-state. In each case, this Court determined that the taxing scheme imposed an impermissible burden on interstate commerce. Here, by contrast, the Ohio taxpayer that decides to spread its business investment into another State does not suffer a higher tax on its Ohio activities as a result. It is simply unable to claim an Ohio tax credit for its out-of-state investment.

Both respondents and the court below highlighted one aspect of the taxing scheme considered in *Maryland v. Louisiana*, namely, the allowance of a severance tax credit arguably designed to encourage in-state gas production. In addition to the first use tax imposed on OCS gas brought onshore, Louisiana imposed an equivalent severance tax on gas extracted from within the State. A credit against the severance tax was allowed for any first use tax paid. Thus, only those taxpayers producing in both locations could obtain the benefit of the credit. This Court found the severance tax credit to be an objectionable aspect of the Louisiana taxing scheme (451 U.S. at 756-757):

> On its face, this credit favors those who both own OCS gas and engage in Louisiana production. The

> obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States.

The court below viewed this Court's discussion of the severance tax credit as support for respondents' contention here that the "economic effect" of the Ohio investment tax credit was "to encourage further investment in-state at the expense of development in other States." Pet. App. 9a.

The court below misunderstood this Court's analysis. Economic pressure was imposed by the severance tax credit because any new gas brought into the State from new investment *offshore* was necessarily subject to the first use tax. If produced in-state rather than offshore, however, this new gas would bear no tax because of the way the credit worked. This Court saw the credit as unacceptably coercive as to offshore producers because it eliminated an otherwise certain tax.

In this case, respondents and the court below have suggested that the Ohio scheme puts a similar economic pressure on in-state taxpayers to make their new investments within the State rather than elsewhere. They claim that those investing in-state will enjoy "a reduced tax burden," while in-state competitors investing their next dollars out-of-state will "face a comparatively higher tax burden." Pet. App. 6a. But, neither respondents nor the court below assert here that the "comparatively higher tax burden" for those investing out-of-state is a certainty, or that it could be completely avoided by investing in-state. The reason why they make no such assertions is clear.

All other things being equal, an Ohio taxpayer making its next machinery and equipment investment out-of-state rather than in-state would *not* face an increased Ohio franchise tax bill. Indeed, such a taxpayer almost certainly would find that, even without the benefit of the investment tax credit, it would actually have *reduced* its Ohio tax liability by investing out-of-state. That is because any new out-of-state investment would have increased the denominator, but not the numerator, of the property factor (and perhaps also the payroll and sales factors) used in its Ohio apportionment formula.[11] An increase in the denominator(s), but not the numerator(s), of the taxpayer's apportionment factor(s) would necessarily cause *less* of its total income to be apportioned to Ohio and therefore *less* Ohio tax to be paid.[12]

Conversely, if the taxpayer had *increased* its in-state investment, the result would have been an equal increase in *both* the numerator(s) and the denominator(s) of the taxpayer's Ohio apportionment factor(s), thereby causing *more* of its total income to be apportioned to Ohio. That, in turn, could potentially produce a *higher* Ohio franchise tax liability, even after allowance for the investment tax credit to which the taxpayer would have been entitled in such a case. In this situation, the tax credit can be seen for what it is, namely, a partial offset to what could otherwise be an increase in Ohio franchise tax as a result of the new in-state investment.

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[11] For franchise tax purposes, Ohio uses the standard three-factor apportionment formula described in note 9, *supra*. Ohio Rev. Code § 5733.05(B).

[12] As noted in *Kraft General Foods v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80-81 (1992), it is appropriate to take the State's entire taxing scheme into account in considering a claim of discrimination.

In short, the situation presented here is the exact opposite of the situation this Court found objectionable in *Maryland v. Louisiana*. There is absolutely no assurance that the decision by an Ohio taxpayer to forego the benefit of the Ohio tax credit by making new investment out-of-state would result in an *increase* in the taxpayer's Ohio tax liability. In fact, the actual result of such an investment decision would ordinarily be to *reduce* its Ohio tax liability, not increase it.

All three of this Court's decisions that were primarily relied on by the court below involved, in one form or another, what the court of appeals referred to as "location incentives." Pet. App. 10a. In each case, the State's taxing scheme sought to influence a location decision by benefiting particular business activity if conducted locally and imposing an additional tax burden on the taxpayer if the same activity were conducted out-of-state. In each case, this Court struck down the taxing scheme in question.

The Ohio tax credit is also a location incentive. But under Ohio's tax regime, while local activity is benefited, there is no additional tax burden imposed if the targeted activity is undertaken elsewhere.

Nothing in the dormant Commerce Clause justifies treating a state tax incentive as unconstitutionally discriminatory when, as here, taking advantage of the incentive actually has the potential for increasing state taxes (by increasing the amount of income to be apportioned to Ohio) and the only consequence of locating the investment elsewhere is foregoing the opportunity to claim the Ohio tax credit. Yet, that is precisely the holding of the court below.

There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce. There is no limitation on the class of taxpayers entitled to claim the

credit. There is no burden imposed by Ohio on those taxpayers, whether in-state or out-of-state, that choose not to take advantage of the credit. As this Court declared 119 years ago, the dormant Commerce Clause has application in a case such as this only if the taxing scheme in question has imposed "a regulation in restraint of commerce among the states." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). There is no such "restraint of commerce" inherent in the Ohio taxing scheme and therefore no basis for declaring the Ohio investment tax credit unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding the Ohio investment tax credit invalid under the Commerce Clause should be vacated and dismissed for lack of jurisdiction or, in the alternative, should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether Ohio's Investment Tax Credit, which encourages economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] Promoting economic development and creating jobs are fundamental concerns of *amici* and their members. Investment tax credits are a vital tool for achieving these objectives. *Amici* thus have a compelling interest in the legal issue presented by this case: whether Ohio's Investment Tax Credit (ITC), which is equally available to in-state and out-of-state firms, violates the dormant Commerce Clause.

The court of appeals held that Ohio's ITC violates the Commerce Clause because the credit is available only to an Ohio franchise taxpayer that invests in the State. This holding jeopardizes investment tax credits in other States in the Sixth Circuit and casts doubt on the constitutionality of numerous other state investment tax credits throughout the nation.

The court of appeals clearly erred in holding that Ohio's ITC violates the Commerce Clause. Beyond that, the court's holding ignores that the States compete against foreign countries for investment and that this competition will likely intensify with increasing globalization. It thus threatens each State's ability to compete for investment internationally as well as nationally.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of briefs *amicus curiae* and have filed blanket consent letters with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The Court has long held that the Commerce Clause limits the power of the States to enact laws that discriminate against interstate commerce. The purpose of the dormant Commerce Clause is to prohibit economic protectionism—that is, benefiting in-state economic interests by burdening out-of-state competitors. Thus, a State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (internal quotations & citation omitted).

Ohio's Investment Tax Credit (ITC) does not violate the dormant Commerce Clause. As the statute makes plain, the ITC is available to all corporations doing business in Ohio that are subject to the State's franchise tax, without regard to whether they are domestic or foreign firms. Moreover, the ITC does not discriminate by favoring other Ohio economic interests such as suppliers or employees.

The Ohio law does not condition the ITC's availability on the taxpayer's agreeing to purchase the qualifying machinery and equipment from Ohio firms. Rather, a firm is free to purchase the equipment that constitutes its investment from whatever manufacturer it chooses, wherever the manufacturer is located. Nor does the ITC discriminate in favor of Ohio residents in employment. It does not require that the taxpayer hire Ohio residents or give them a hiring preference to qualify for the credit. Indeed, it is likely that some employees who work at DaimlerChrysler's Toledo plant commute from neighboring States, and others have moved to Ohio to take advantage of new job opportunities at the plant.

2. "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn*

Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994). State laws which act as export tariffs also violate the Commerce Clause. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Rev.*, 483 U.S. 232, 248 (1987).

The Ohio ITC is not a tariff nor its functional equivalent. The ITC neither increases the costs of goods and services sold by out-of-state firms to Ohio residents nor increases the costs of goods and services sold by Ohio firms to out-of-state residents. The ITC thus does not impose a discriminatory burden on interstate commerce. Quite the opposite, the ITC likely functions in a manner that promotes interstate commerce.

The ITC encourages a firm to acquire manufacturing equipment, wherever made, by providing what is in effect up to a 13.5% discount on the price of new equipment. Thus, the ITC may subsidize the purchase of goods made in other States and thereby promote interstate commerce.

The ITC may also function as an export subsidy by lowering DaimlerChrysler's costs of manufacturing vehicles at its Toledo plant. Competition in the market for similar vehicles may force DaimlerChrysler to reduce its prices for these vehicles, which are sold in other States. Moreover, Ohio has not conditioned the ITC's availability on DaimlerChrysler's agreement to sell some or all of its vehicles to Ohio residents. Thus, in contrast to a discriminatory tax on out-of-state consumers, the Ohio ITC may well be subsidizing vehicle purchases made by non-Ohio consumers of DaimlerChrysler's products.

The Ohio ITC's likely practical effects on interstate commerce are thus far different from those of measures that the Court has invalidated. The ITC does not discriminatorily tax goods or services produced in other States. Nor does it result in the State imposing higher taxes on goods made or services performed in Ohio and marketed to non-Ohio residents.

3. Nor is there any merit to the court of appeals' conclusion that the ITC discriminates against interstate commerce because "the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden based directly on its new in-state investment while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." Pet. App. 6a. Contrary to the views of the court of appeals, the two firms are not "similarly situated" once they make their investments. *Id.*

The firm that invests in Ohio necessarily increases the amount of its Ohio property and payroll, thereby increasing the amount of its net income apportionable to Ohio and raising its Ohio franchise tax liability. In contrast, the firm that invests in another State typically decreases its property and payroll factors thus decreasing its Ohio franchise tax liability by reducing the amount of its net income apportionable to Ohio. Because the act of investing changes the tax base of each firm, they are not similarly situated, and no claim of discrimination is sustainable. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The court of appeals erred in holding that Ohio's Investment Tax Credit (ITC) violates the dormant Commerce Clause because it discriminates against interstate commerce. The court acknowledged that "the investment tax credit . . . is equally available to in-state and out-of-state businesses." Pet. App. 6a. The court, however, failed to conduct the requisite "sensitive, case-by-case analysis of [the credit's] purposes and effects" before it concluded that "the provision 'will in its practical operation work discrimination against interstate

commerce.'" *Id.* at 5a (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

The court apparently accepted respondents' argument that the tax credit discriminates against interstate commerce because it "coerc[es] businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Id.* at 6a. The court observed that this was so because a taxpayer "can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere." *Id.*

The court also appears to have accepted respondents' contention that the credit discriminates against interstate commerce because "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.* According to respondents (and apparently the court below), "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and . . . the result is to hinder free trade among the states." *Id.* at 9a (citation omitted). Relatedly, the court rejected the State's argument that tax incentives "are permissible as long as they do not penalize out-of-state economic activity." *Id.*

As explained below, this Court's cases do not support invalidation of Ohio's ITC, which is available to all Ohio franchise taxpayers without regard to whether they are in-state or out-of-state businesses. Nor does the credit discriminate against interstate commerce because it is unavailable to Ohio taxpayers who choose to invest outside of the State. While the credit is intended to promote economic

development within Ohio, it neither functions as a tariff nor coerces businesses to invest in the State. The judgment of the court of appeals should therefore be reversed.

A. Ohio's ITC Does Not Violate the Dormant Commerce Clause's Core Purpose of Prohibiting States From Protecting In-State Interests From Out-of-State Competitors.

The Court has long recognized "that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (citations omitted). This "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (citations omitted).

It is thus fundamental that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959))). This "prohibition . . . follows inexorably from the basic purpose of the Clause." *Boston Stock Exchange*, 429 U.S. at 329. As the Court has explained, "[p]ermitting the individual States to enact laws that favor local enterprises *at the expense of out-of-state businesses* 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id.* (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)) (emphasis added).

The Court has also recognized, however, "that States may try to attract business by creating an environment conducive